may be recovered for and that which may not, but here we seem to have another point upon which conflicts will result in the interpretation of these two statutes. W. C. M.

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EVIDENCE OF HABIT OF CARE, CAUTION AND PRUDENCE AS NEGATIVING CONTRIBUTORY NEGLIGENCE.—In an action for death by wrongful act, when there were no eyewitnesses and no facts susceptible of proof to disclose how the fatality occurred, the plaintiff, having the burden of proof with regard to contributory negligence, was allowed to prove the "habits of the deceased as to care, caution, and prudence, as tending to raise the presumption that he was in the exercise of due care and caution for his own safety at the time he was killed." The Supreme Court of Illinois upheld this instruction, saying: "As the proof made relative to the habits of the deceased tended to raise this presumption, it was sufficient to go to the jury." *Casey* v. *Chicago Rys. Co.* (Ill. 1915), 109 N. E. 984.

The rule that, in the absence of eyewitnesses and of proof of the circumstances surrounding the case from which the presence or absence of contributory negligence might be determined, habit of care is admissible as tending to raise a presumption that there was no contributory negligence was laid down by the Illinois court in *Chicago, Rock Island & Pacific Ry. Co.* v. *Clark,* 108 Ill. 113, and has been applied in a long line of Illinois decisions, and more often, probably, than in any other state.

There is, however, a decided conflict in the holdings of the various courts which have been called upon to pass upon the question as to whether or not habit of care and habit of negligence are admissible to prove the absence or existence of contributory negligence. The holding of the Illinois court finds support in California in *Craven* v. *Cent. Pac. R. R. Co.,* 72 Cal. 345 (habit of negligence); in Kansas in *Missouri Pac. Ry. Co.* v. *Moffatt,* 60 Kansas 113 (habit of care); in New Hampshire in *Parkinson* v. *Nashua & Lowell R. R. Co.,* 61 N. H. 416 (habit of negligence); *Evans* v. *Concord R. R. Corp.,* 66 N. H. 194 (habit of care), and *Lyman* v. *B. & M. R. R.,* 66 N. H. 200 (habit of care); and in Rhode Island in *Cassidy* v. *Angell,* 12 R. I. 447 (habit of care). The contrary view seems to be held in Connecticut in *Morris* v. *Town of East Haven,* 41 Conn. 252 (habit of care); in Pennsylvania in *Baker* v. *Irish,* 172 Pa. St. 528 (habit of negligence), and in Wisconsin in *Propsom* v. *Leatham,* 80 Wis. 608 (habit of negligence), though in all of these cases there seem to have been eyewitnesses; under such circumstances, even by the Illinois rule, the evidence would not have been admitted, but these courts do not seem to take this fact into consideration, whereas, in *Dalton* v. *Chicago, Rock Island & Pac. Ry. Co.,* 114 Io. 527, and *Zucker* v. *Whitridge,* 205 N. Y. 50, the court makes this distinction, deciding merely that such evidence is not admissible where there are witnesses. These holdings are not, therefore, contrary to the Illinois cases.

Both habit of care and habit of negligence would seem to fulfill the first requirement of admissibility, *i. e.,* they possess a distinct probative value.

In every-day affairs, such evidence is continually being considered, weighed and acted upon by men of business. Surely its probative value does not change when it is used in court. As is said by McFarland, J., in *Craven* v. *Cent. Pac. R. R. Co.,* supra, "A sensible man, called upon, out of court, to determine whether or not a certain person had on a certain occasion carelessly jumped off a moving train of cars, and finding the direct testimony as to the matter conflicting, would naturally and properly give *some* weight to the fact that the person was not in the habit of alighting from cars in that manner; and the consideration of such a fact in cases resembling the one at bar has frequently been sanctioned *in* court." True, it is the negligence or care in the particular case with which the court is immediately concerned, but evidence of habit of care or negligence is admissible only because, and in so far as, it tends to establish the one or the other; and, therefore, it must be shown to amount to a habit, and, what is more, a habit of action under similar circumstances. WIGMORE, § 376. And as is said by MCFARLAND, J., in *Craven* v. *Cent. Pac. R. R. Co.,* supra, "It may be remarked, generally, that, unless the case falls within some well-recognized class of exceptions, an evidentiary fact is relevant to the principal fact when the former tends to show that the latter probably did or did not occur; and mere remoteness usually goes to weight, and not to admissibility, of evidence."

Granting the probative value of this evidence and limiting its admissibility strictly to cases where the facts and circumstances upon which negligence or lack of negligence must be predicated (the soundness of which limitation may admit of some doubt), is there any other reason why it should not be admitted? Habit of care or negligence must not be confused with character evidence. WIGMORE, §§ 92, 97. The two are entirely different and are established in different manners, and it is conceded that evidence of character is, as a general rule, inadmissible in civil cases. The manner in which these two kinds of evidence are confused is illustrated in the case of *Chase* v. *Me. Cent. R. R. Co.,* 77 Me. 62.

It remains to be considered whether or not this evidence might be excluded as raising a collateral issue, as this is often assigned as a reason by those courts which exclude it. The mere fact that it does raise an issue which is collateral to the principal issue in the case does not conclusively establish its inadmissibility. Such evidence is many times admitted; and when it is excluded it is usually because the detriment far outweighs the benefit, *i. e.,* the confusion produced cannot be outweighed by the probative value of the evidence sought to be introduced. The probative value of the evidence in the instant case is obvious.

On principle, therefore, there seems to be no sound reason why evidence of habit or care and caution should not be admissible as tending to establish the absence of contributory negligence. The argument herein made applies equally for its admissibility under similar conditions as tending to establish the absence of negligence on the part of the defendant. The Illinois rule applied in the principal case would seem to be consonant with sound reason even if not in accord with the weight of authority. W. F. W.